Tentative Rulings for May 10, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

15CECG03505	***Orm v. Gonzales*** **(Dept. 402)**
14CECG03262	***Michael W. Kreidel v. County of San Bernadino*** **(Dept. 403)**
15CECG03102	***Moultrie v. Bed, Bath & Beyond, Inc., et al.*** **(Dept. 403) (Continued Pre-Trial Discovery Conference) There is no tentative ruling and the hearing will go forward on this matter on May 12 unless the court is notified that the party will submit the matter without an appearance.**
14CECG03898	***Herold v. James*** **(Dept. 503)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(6)

Tentative Ruling

Re: ***Bank of America, N.A. v. Andros***
Superior Court Case No.: 15CECG01015

Hearing Date: May 10, 2016 (**Dept. 402**)

Motion: By Plaintiff Bank of America, N.A., for entry of judgment on stipulation (Code Civ. Proc., § 664.6)

Tentative Ruling:

To grant. The Court will execute the judgment which has been submitted.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 5/9/2016 .
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Infinity Insurance Company v. Smith***
Court Case No. 15CECG03726

Hearing Date: **May 10, 2016 (Dept. 402)**

Motion: Plaintiff's Motion for Summary Judgment

Tentative Ruling:

To deny the motion in its entirety.

Explanation:

A party cannot make a motion under Code of Civil Procedure section 437c until after the general appearance of the party against whom it is directed. (*Id.*, subd (a).) A defendant most often makes a general appearance by answering the complaint, demurring to or moving to strike it, or moving for change of venue, and in one case the court found that defendant's appearance at an ex parte hearing to oppose plaintiff's application for a right to attach order constituted a general appearance. (Code Civ. Proc. § 1014; *Sadlier v. Superior Court* (1986) 184 Cal.App.3d 1050, 1052.). Here, none of the defendants have made a general appearance, and in fact plaintiff has taken the default of two them, and only failed to have the third defendant's default entered because of a defective proof of service.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 5/9/2016 .
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***J.R. Simplot Company v. Calzada***
Superior Court Case No.: 15CECG02415

Hearing Date: May 10, 2016 (**Dept. 402**)

Motion: By Defendant Emilio Calzada dba Emilio V. Calzada Sheep Co. to set aside default and default judgment

Tentative Ruling:

To deny.

Explanation:

In order to obtain relief for mistake, the mistake must have been excusable. (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 898.) In order to be excusable, the act or omission must be one which might have been committed by a reasonably prudent person under the same circumstances. (*Transit Ads, Inc. v. Tanner Motors Livery LTD* (1969) 270 Cal.App.2d 275, 279.)

Defendant Emilio Calzada ("Defendant") admits that in the fall of 2015, he was discussing a possible deal with Khalid Mayar, and that it was through those discussions that he was introduced to and met with attorney James Mootz. Defendant admits he received the mailing of the summons and complaint in mid to late September of 2015. Defendant reviewed them with a "friend" and believed he had until November 30 to appear at court, even though the summons warns the person in English and in Spanish that they are being sued and that they have 30 days to respond to file a written response, and if they do not, they can lose the case by default, and their wages, money, and property may be taken without further warning from the court.

Defendant was going to meet with Mr. Mootz "in the next few days" so he took the papers to Mr. Mootz. Defendant says he gave Mr. Mootz the documents at the meeting, and that Mr. Mootz reviewed them and Mr. Mootz told him he was being sued by Plaintiff J.R. Simplot Company ("Plaintiff"). Mr. Mootz allegedly told Defendant "he would handle it." (Decl. of Emilio Calzada, ¶3.) Defendant does not say that he left the papers with Mr. Mootz.

Mr. Mootz says in his declaration he met with Defendant in the fall of 2015 to discuss Defendant's financial situation including amounts owed as a result of his dry farming operations, and various options to permit Defendant to continue dry farming including the formation of certain business entities and/or the possible filing of bankruptcy. During these discussions, Mr. Mootz and Defendant also discussed the amount allegedly owed by Defendant to Plaintiff for seed supplied for the 2014 wheat crop. (Decl. of James Mootz, ¶¶1-2.) Mr. Mootz does not say he saw any papers

belonging to Defendant or that he kept any papers that Defendant brought him at that time.

Mr. Mootz does not say in his declaration that he reviewed papers belonging to Defendant until February of 2016, when Defendant brought the default judgment papers to Mr. Mootz and Mr. Mootz told Defendant default judgment had been entered against him and he was scheduled for a debtor's examination on February 26, 2016. (Decl. of James Mootz, ¶3.)

Whether or not Defendant actually left the documents with Mr. Mootz is crucial to the reasonableness of Defendant's belief that Mootz was "handling" this case on his behalf. Because Mr. Mootz doesn't mention seeing any papers at the fall of 2015 meeting, and because Defendant only says that Mr. Mootz "reviewed" the documents, the inference is that if any papers were brought to the fall of 2015 meeting, they were not left with Mr. Mootz to "handle."

There were other documents mailed directly to Defendant in this case that he does not address in his declaration: The request to enter default was mailed to Defendant on October 13, 2015; the notice of entry of judgment was mailed to Defendant on January 12, 2016; and the notice of the hearing to correct the clerical error in the judgment was mailed to Defendant on January 14, 2016. This would have been further indication to a sophisticated business owner/farmer like Defendant, who has been farming for 30 years, and who has worked with attorney Kari Ley in the past, presumably on other legal matters, that Mr. Mootz was not "handling" the lawsuit on Defendant's behalf.

Defendant says he was introduced to and met with Mr. Mootz while discussing a possible deal with Khalid Mayar of Free Range Livestock that would allow Defendant to continue dry farming in 2015 and 2016. Defendant says he met with Mr. Mootz three or four times to discuss his finances including money Defendant owed from dry farming and ways to allow him to dry farm in 2016. During his meetings with Mr. Mootz, Mr. Mootz told Defendant ideas he had to deal with people Defendant owed money to including Plaintiff and ways to allow Defendant to continue dry farming including a possible new company with Khalid Mayar and the possible filing of bankruptcy. (Decl. of Emilio Calzada, ¶2.) The fact that Defendant was discussing his financial situation including possible bankruptcy, without a positive statement that Defendant had left the summons and complaint with Mr. Mootz, leads to a conclusion that Defendant's belief that Mr. Mootz was "handling" this lawsuit was not reasonable.

The situation here is not like the one in *Miller v. Cortese* (1949) 94 Cal.App.2d 848, cited by Defendant. There, a default was properly set aside where there were three defendants, all served with the identical complaint, where the defaulting defendant had been told by one of the other two defendants that an attorney had been hired to represent all three of them, and that an answer had been filed. Through some misunderstanding, the attorney had filed an answer on behalf of only two of the three defendants, leading to a default and default judgment. The appellate court said there was no abuse of discretion on the part of the court setting aside the default and default judgment.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 5/9/2016 .
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Valencia v. City of Reedley***
Court Case No. 15CECG00355

Hearing Date: **May 3, 2016 (Dept. 402)**

Motion: Defendant's Motion for Summary Judgment or, in the alternative, Summary Adjudication

Tentative Ruling:

To deny the motion in its entirety.

To overrule plaintiffs' evidentiary objections to the Declaration of Chris Tamez based on Code of Civil Procedure section 437c, subdivision (e): this statute does not provide for an evidentiary objection; it merely provides a statutory basis for discretionary denial of a motion for summary judgment, and the court does not base its ruling on this subdivision. Plaintiff's Objection to Paragraph 8 of Mr. Tamez's declaration is overruled, as his personal knowledge is established at Paragraph 2. Plaintiff's objection to Mr. Tamez's deposition testimony at p. 78:20-25 is sustained on the ground of relevance.

Regarding defendant's evidentiary objections, all but a few are moot since the ruling is grounded on defendant's failure to meet its burden of production. The court has not utilized any of plaintiff's evidence except the testimony of Jerry Gonzales regarding the pictures he took on May 16, 2016, for reasons explained below. Defendant's evidentiary objections to that testimony (Plaintiff's Ex. 3, 41:22-42:18 and 43:2-25) are overruled and defendant's motion to strike this testimony is denied.

Explanation:

As the party moving for summary judgment, defendant bears the initial burden of production to make a *prima facie* showing that Plaintiff cannot establish one or more elements of the at-issue cause of action or that there is a complete defense. (Code Civ. Proc. § 437c, Subd. (p)(2); *Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.) Only after the moving party has carried this burden does the burden shift to the other party to show that a triable issue of one or more material facts exists – and this must be shown via specific facts and not mere allegations. [*Id.*] A *prima facie* showing is one that is sufficient to support the position of the party in question. "No more is called for." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, 861-862.)

Defendant argues that two issues subject the complaint to summary judgment: 1) the alleged sidewalk defect was trivial and thus not a dangerous condition as a matter of law; and 2) the City of Reedley did not have actual or constructive notice of the uplifted or defective sidewalk.

Whether Sidewalk was a Trivial Defect:

The trivial defect rule is codified at Government Code section 830.2: a claimed defect on public property is not a dangerous condition where the trial or appellate

court views the evidence in the light most favorable to the plaintiff and determines as a matter of law that the risk created by the condition "was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." This allows the issue to be tested by a motion for summary judgment. The fact that the government entity took action after an injury occurred to protect against a condition of public property cannot be used as evidence that the property was in a dangerous condition at the time of the injury. (Gov. Code § 830.5, subd. (b).) However, where evidence of this is independently relevant on some other issue, the policy objection to this evidence is overcome by the limited admissibility doctrine. (*Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320, 1341, *as modified on denial of reh'g (June 30, 2000)*.)

Particularly with sidewalk defects, the size of a rise or gap between portions of the sidewalk, while an important factor, is not the only determining factor: "all of the circumstances surrounding the condition must be considered in the light of the facts of the particular case." (*Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 729.) For instance, courts have considered how long the defect has existed, the time of day or night the accident occurred or whether the sidewalk was shadowy, whether plaintiff had ever traveled over that portion of the sidewalk before, whether plaintiff contributed to the accident in any way, whether there were breaks in the sidewalk which were irregular and jagged or with missing pieces, whether there were foreign substances present (such as grease and oil), whether there is any evidence that other persons have been injured on this same defect, and any other "aggravating factor" that might be present in a particular case. (*Id.,* surveying numerous cases.) "As to what constitutes a dangerous or defective condition no hard-and-fast rule can be laid down, but each case must depend upon its own facts. [Citations.] Whether a given set of circumstances creates a dangerous or defective condition is primarily a question of fact." (*Id.* at p. 728 (internal quotes omitted).)

And while the court in *Fielder* indicated that there is no "tape measure test" in determining whether a sidewalk defect was trivial as a matter of law, two slabs of sidewalk nonaligned horizontally "by a slight depression" may be found trivial as a matter of law "provided that there are no aggravating circumstances attending the defect." (*Fielder, supra*, 71 Cal.App.3d at p. 729.) In the end, the rule is that "if reasonable minds can differ on the question it is one of fact, and that it is only when reasonable minds must come to the conclusion that the defect is so trivial that a reasonable inspection would not have disclosed it, that the question becomes one of law. Each case must be determined on its own facts." (*Id.* at p. 731.)

Here, defendant has not met its burden of production in establishing that the defect at issue is trivial as a matter of law. Defendant relies mainly on the testimony and declaration of City employee Chris Tamez, and his testimony is contradictory and equivocal on several key points. It fails to establish that there was no visible defect at the place where Mr. and Mrs. Valencia (and in fact, Mr. Tamez himself) testified Mrs. Valencia fell. Mr. Tamez insisted that on the day of the accident Mr. Valencia pointed out the tree well as the area where Mrs. Valencia tripped, and he testified this is why the

only close-up "tape measure" picture he took was of a slight rise in the sidewalk at this area. And yet when asked to identify where he understood the accident to have taken place he clearly identified the area *next to* the tree well (the same area Mr. and Mrs. Valencia testified to), and more importantly, this was the area he promptly sent City workers out to repair. Yet he took no close-up photos of *this* area on the day of the accident, and his photos presented into evidence do not clearly show there is no visible height difference at the point on either side of the asphalt strip where it meets the sidewalk.

Even if it is assumed, *arguendo,* that Mr. Valencia did point out the tree well as the place Mrs. Valencia tripped, Mr. Tamez' actions in immediately focusing on a *different area* to repair, and yet not taking a clear, close-up picture of that area at least raise the question of whether he saw something of concern in that area. While the City's subsequent remedial repair is generally not evidence of a dangerous condition (Evid. Code § 1151; Gov. Code § 830.5), here evidence of the subsequent repairs is admissible for two independent reasons. First, to impeach Mr. Tamez' testimony as to what he saw (or did not see) on the day of the accident. (*Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 615.) Second, to show the possibility or feasibility of eliminating the cause of the accident. Defendant's reply argument that this cannot be a basis to admit this evidence (since there was no "cause" found upon inspection) is not well taken: as noted above, defendant has failed to support its fact that no "cause" was found upon inspection on the date of the accident. (*Baldwin Contracting Co. v. Winston Steel Works, Inc.* (1965) 236 Cal.App.2d 565, 573.)

Defendant also failed to establish that the asphalt itself did not create an "aggravating factor" here. This is not a case where a slab of sidewalk met another slab of sidewalk and plaintiff claims there was a height difference that caused her trip, as in *Fielder*. Rather, the sidewalk met a strip of cold mix asphalt and, as discussed below, defendant failed to support its stated fact that the asphalt patch provided a safe long-term (i.e., permanent) repair.

Further, defendant fails to establish that the site of the trip was not in shadow (part of Fact 2) by merely stating that Mrs. Valencia *did not recall* there being shade. This is obviously a potentially aggravating factor contributing to the accident, especially as the asphalt itself was dark in color and shade could have contributed to making any defect less visible. The fact that plaintiff submitted City employee Jerry Gonzalez' testimony along with pictorial evidence of photos he took a year later on the anniversary of the accident date (May 16, 2015), at around the same time of day as the accident, shows that the City could have presented evidence on this issue (rather than merely state what Ms. Valencia "did not recall"), but it did not. Defendant's evidentiary objections to this evidence are overruled because Mr. Gonzalez adequately authenticated the photographs and stated the date and approximate time he took them, and the *color* photographs attached to the court-filed papers shows that the area in question was in shadow.

Issue of Notice of Defect:

Even if the defect in question is presumed to be dangerous, the plaintiff must still prove that the public entity had actual or constructive notice of the condition and failed to remedy it within a reasonable time. (Gov. Code § 835.2; *Reinach v. City and County of San Francisco* (1958) 164 Cal.App.2d 763, 766.) Constructive notice is established only if plaintiff shows that "the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." (Gov. Code § 835.2, subd. (b).)

Defendant's Fact 12 – that the "asphalt patch can remain in place permanently and was safe to use on sidewalks" – was not adequately supported by Mr. Tamez testimony. At one point he testified that cold mix asphalt "doesn't harden over time" and "stays pliable" (Ex. 4, p.41:15-17), but when plaintiff's counsel followed up by asking him if that meant a person stepping on it might leave a depression in the asphalt, he answered simply answered "No" (*Id.,* p.41:22-24) but did not explain this apparent contradiction in his testimony (nor did he address this issue in his declaration in support of this motion). A little later he testified that cold mix was used for repair patches because it "will stay in place" and when asked if it was a permanent fix he answered "It can be," but was unable to specify any place in the City of Reedley it had been so used. (*Id.,* p. 42:23-43:11.)

The existence of the asphalt at this location and whether it is properly considered a "permanent fix" (i.e., considered safe) is central to the consideration of whether it was dangerous to use it and leave it in place for a long period of time, and this in turn impacts the issue of defendant's notice of a condition creating a danger to the public. (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 836—public entity's creation of the dangerous condition dispenses with necessity of notice.) Arguably, this may be an issue requiring an expert declaration, as it is sufficiently beyond common experience that an opinion would assist the trier of fact. (Evid. Code § 801.) Defendant did not provide any expert testimony to establish Fact 12, and Mr. Tamez's few and contradictory statements at his deposition are insufficient to establish that the cold mix patch was either safe or permanent.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 5/9/2016 .
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Petrosyan v. Eagle Fire and Water, et al.***
Court Case No. 13 CECG 03828

Hearing Date: May 10, 2016 (Dept. 402)

Motion: Defendants' and Cross-Complainant's Motion for Attorney's Fees

Tentative Ruling:

To take off calendar due to the fact plaintiffs appear to have filed for bankruptcy. Plaintiffs are ordered to file a Notice of Stay of Proceedings (Judicial Council form CM-180) with this Court without delay.

To set a Bankruptcy Status Conference for August 11, 2016 at 3:30 p.m. in Department 402.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 5/9/2016 .
(Judge's initials) (Date)

Tentative Rulings for Department 403

(29)

Tentative Ruling

Re: ***Bank of America v. Gerald Sewell***
Superior Court Case No. 14CECG01081

Hearing Date: May 10, 2016 (Dept. 403)

Motion: Plaintiff's motion to strike Defendant's answer, and enter default

Tentative Ruling:

To deny the motion to strike. To find the request to enter default moot.

IF ORAL ARGUMENT IS REQUESTED, IT WILL BE HELD ON THURSDAY, MAY 12, 2016 AT 3:00P.M. IN DEPARTMENT 403.

Explanation:

Code of Civil Procedure section 187 affords the trial court the means necessary to carry its jurisdiction into effect, and the power to adopt "any suitable process or mode of proceeding which may appear most conformable" to the spirit of the Code. (Code Civ. Proc. §187.) Section 187 " 'relates primarily to procedural matters, typically to control the court's own process, proceedings and orders, but also may relate to situations in which the rights and powers of the parties have been established by substantive law or court order but workable means by which those rights may be enforced or powers implemented have not been granted by statute. [Citation.]' [Citation.]" (*Phillips, Spallas & Angstadt, LLP v. Fotouhi* (2011) 197 Cal.App.4th 1132, 1142; Code Civ. Proc. §187.)

Code of Civil Procedure section 575.2 authorizes the promulgation of local rules providing for a motion to strike a pleading of a noncompliant party to an action, however no such local rule has been promulgated by the Fresno County Superior Court.

Fresno County Superior Court Local Rules, rule 1.1.6, provides that "unlawful interference with the proceedings of the court…may be punishable by contempt," and that the court may order the offending party to pay the other party's reasonable expenses and fees, may order a change in the calendar status of the case, and impose "any other sanctions authorized by law." (Fresno County Super. Ct. Local Rules, rule 1.1.6(A).)

Terminating sanctions are authorized by Code of Civil Procedure sections 2023.030 and 2031.300, and are generally warranted where there is a willful abuse of

the discovery process. (See, e.g., *Van Sickle v. Gilbert* (2011) 196 Cal.App. 1495, 1516; *Doppes v. Bentley Motors, Inc*. (2009) 174 Cal.App.4th 967, 991.)

In the case at bench, Plaintiff seeks to strike Defendant's answer on the ground that Defendant has "failed to appear or file bankruptcy." (Mot. to Strike, 4:8-9.) The Court notes that the minute order dated March 29, 2016, instructed Plaintiff to move to strike Defendant's answer, however this was based on the presumption that such would be undertaken only if there were sufficient legal grounds on which to base the motion. Plaintiff has not provided sufficient authority to grant the motion. Accordingly, the motion is denied.

In light of the ruling on the motion to strike, Plaintiff's request to enter Defendant's default is moot.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 05/09/16 .
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Gryphon Solutions, LLC v. Silva***
Superior Court Case No.: 11CECG01541

Hearing Date: May 10, 2016 (**Dept. 403**)

Motions: Final approval of class action settlement, motion for attorney's fees

Tentative Ruling:

To grant, and to set a status conference hearing for November 10, 2016, in at 3:28 p.m., in Dept. 403. No later than 10 court days before the status conference, further declarations concerning the following items must be filed: A further declaration of Phil Cooper concerning the status of all cashed and uncashed checks of the $100 to be paid to all settlement class members who made a payment to Gryphon as a result of a secondary action, except those who executed a settlement agreement containing written waiver of rights under Civil Code section 1542; further declaration(s) of person(s) who have personal knowledge of: the status of filing of partial satisfaction of credit judgment credit of up to $500 to all settlement class members who still owe money to Gryphon on a judgment that was the subject of a secondary action, except those who executed written waiver of rights under Civil Code section 1542; the status of the dismissal of all secondary actions still pending against any settlement class members and for all judgments that were entered against settlement class members in a secondary action, the status of the filing of notice of satisfaction of judgment indicating that the judgment creditor has accepted payment or performance other than that specified in the judgment in full satisfaction of the judgment; and finally, the status of the filing of the partial satisfaction of judgment in the original proceeding, *CACV of Colorado, LLC v. Silva*, Fresno County Superior Court Case No. 06CLCL00292.

The Court will execute the judgment which has been submitted.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 05/09/16 .
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Anderson v. Western Health Resources***
Court Case No. 14CECG02461

Hearing Date: **May 10, 2016 (Dept. 403)**

Motion: Petition by Defendant Beverly Healthcare-California, Inc., *dba* Golden LivingCenter – Hy-Lond to Compel Contractual Arbitration and Motion to Stay Action

Tentative Ruling:

To grant the petition to compel arbitration and to stay proceedings pending arbitration of plaintiffs' claims against moving defendant. To take the upcoming demurrers and motion to strike off calendar due to the arbitration stay, subject to the moving parties re-noticing said motions once the stay has been lifted. To take the Order to Show Cause set for June 9, 2016 off calendar, and to set an Arbitration Status Review hearing on Thursday, November 10, 2016. To sustain the evidentiary objections to Paragraph 3 of the Declaration of Danielle M. VandenBos and to Paragraph 9 of the Declaration of Rebecca Xiong. To overrule all other evidentiary objections.

IF ORAL ARGUMENT IS REQUESTED, IT WILL BE HELD ON THURSDAY, MAY 12, 2016 AT 3:00 P.M. IN DEPARTMENT 403.

Explanation:

Evidentiary Objections:

Rebecca Xiong sufficiently authenticated the subject arbitration agreement ("ADR Agreement"). Persons other than a Custodian of Records can authenticate business records: any witness with the requisite firsthand knowledge can do so. (Evid. Code § 1271, subd. (c).) Ms. Xiong testified that she is the Director of Admissions, and so she has a business duty to know what documents constitute the "admissions packet," which includes the ADR Agreement, and how these documents are prepared. The court is vested with broad discretion to determine whether the preliminary facts are sufficient to determine whether a writing meets the requirements of the business records exception. (*Exclusive Florists, Inc. v. Kahn* (1971) 17 Cal.App.3d 711, 715.)

It is arguable, however, that she does not have the requisite personal knowledge of the mode of preparation of the "History and Physical" document submitted as Exhibit 3 to authenticate that as a business record. However, this document is not crucial to the analysis.

Ms. Xiong's testimony about her "custom and practice" is admissible: evidence of a person's habit or custom is admissible to prove conduct on a specified occasion in conformity with that habit or custom. (Evid. Code § 1005; *People v. Memro* (1985) 38 Cal.3d 658, 681; *People v. McPeters* (1992) 2 Cal.4th 1148, 1178, *as modified on denial of reh'g (Sept. 23, 1992)*.) Thus, her testimony is sufficient to establish that she supervised and witnessed the signing of all documents on June 20, 2003. The ADR Agreement itself

shows a signature of the witness, and that this was Ms. Xiong (she signed both *as witness* and as defendant's representative, and her name is printed below one of those signatures).

Her testimony about her custom and practice establishes that she went through all the documents and explained them "front to back," she explained the arbitration process and that signing the ADR Agreement was optional, that she gave Ms. Anderson as much time as was necessary to review and understand the documents before signing them, and that she alerted Ms. Anderson to the revocation clause. It is sufficient to establish that she observed Ms. Anderson's behavior for any indications of incapacity or incompetency. It is clear from the testimony that she considers it her business duty to determine whether it is appropriate to have a patient sign admissions-related documents. Thus, her testimony as to her belief that Ms. Anderson was "alert, oriented and fully capable of making her own decisions" is admissible, not to establish this as a medical certainty (as plaintiffs argue Ms. Xiong is incompetent to do) but rather to establish that Ms. Xiong was following her custom and practice of determining this before following through with obtaining the patient's signature on the admissions documents.

The testimony of Lisa McQuone is relevant, so the objection to her declaration is overruled. The sense of her testimony is that she is speaking about the general and longstanding operational practices of defendant's business. Common sense must also be applied in receiving the testimony, as she describes operational practices that are generally understood to be common to all skilled nursing facilities.

Agreement Involves Interstate Commerce:

As noted above, Ms. McQuone's testimony is relevant on this issue. Also the parties expressly agreed that the contract involved interstate commerce, at Article 1. It is reasonable to conclude that in general claims against California skilled nursing facilities arising out of patient care address interstate commerce, given such facilities' use and provision of goods and services from vendors outside California, their advertisement to out-of-state residents, their provision of services to non-California residents, and their participation in and receipt of revenues from Medicare and Medi-Cal. (*Valley View Health Care, Inc. v. Chapman Id.* (E.D. Cal. 2014) 992 F.Supp.2d 1016, *appeal dismissed (Aug. 7, 2014)*.)

The Federal Arbitration Act ("FAA") Applies:

Plaintiffs argue that the ADR Agreement provides that it is governed by California law because Article 1 states that disputes "will be determined by submission to arbitration as provided by California law" and at Article 5 it provides that "damages awarded…shall be determined in accordance with the provisions of the state or federal law applicable to a comparable civil action."

Plaintiffs' argument is not well taken. Both *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* (1989) 489 U.S. 468 ("*Volt*") and *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376 ("*Cronus*") are distinguishable because in neither of those cases did the parties expressly agree that

the FAA would apply, as here. *Volt* stands for the proposition that *where there is no such agreement*, a choice-of-law provision designating "California law" will incorporate state arbitration rules, even there the contract otherwise implicates the FAA (i.e., because it involves interstate commerce). In *Cronus,* the parties also did not specify which arbitration rules applied, but designated California law as applying generally to the contract, and merely indicated that this "would not preclude" application of the FAA "if it would be applicable." (*Cronus*, 35 Cal.4th at p. 381, *fn* 3.) The Court indicated: "We simply hold that the language…calling for application of the FAA 'if it would be applicable' should not be read to preclude application of Section 1281.2(c)…." (*Id.* at p. 394.)

Here, the parties *did* expressly agree that the FAA would apply, and the language plaintiff cites does not show the parties specified that California law would apply to the contract (i.e., that these were choice-of-law provisions). The ADR Agreement states, at Article 3, that it "shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections l-l6." More importantly, the second sentence of that Article indicates that the "*procedures* set forth in the Federal Arbitration Act, 9 U.S.C. Sections 1-16, shall govern any petition to compel arbitration." (Emphasis added.) The sentence in Article 1 plaintiffs cite to was clearly included *because it was expressly required to be included* by Code of Civil Procedure section 1295; it merely states that California law provides for medical malpractice claims to be submitted to arbitration. As such, it is not a choice of law provision that trumps Article 3.

The sentence at Article 5 is properly understood when the language plaintiffs left out of the sentence (by ellipsis) is included: the parties agreed that "damages awarded, if any, *in an arbitration conducted pursuant to this Alternative Dispute Resolution Agreement* shall be determined in accordance with the provisions of the state or federal law applicable to a comparable civil action…." (Emphasis added.) This clearly indicates the parties' intent to apply California law *to determine damages in arbitration*, and thus it certainly does not evidence the intent to incorporate California arbitration law, and specifically Section 1281.2(c). Neither of these provisions trump the parties' express agreement that the FAA applies. When parties choose the FAA in their arbitration agreement, the FAA preempts California law, and the court may not apply Section 1281.2(c). (*Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1115.)

Under the FAA courts must compel arbitration of arbitrable claims even though nonarbitrable claims in the same action remain to be tried in court and the result is "possibly inefficient maintenance of separate proceedings in different forums." (*KPMG LLP v. Cocchi* (2011) 132 S.Ct. 23, 26; see also *Reliance Ins. Co. v. Raybestos Products Co.* (7th Cir. 2004) 382 F.3d 676, 680—"If there is to be a duplicative proceeding exception, it is for Congress to add it to the FAA." See also *Encore Productions, Inc. v. Promise Keepers* (D. Colo. 1999) 53 F.Supp.2d 1101, 1113—"Federal law requires piecemeal resolution of cases when necessary to give effect to an arbitration agreement.)

Issue of Competency:

The party resisting arbitration has the burden to prove by a preponderance of the evidence a ground for denial (such as incompetence, unconscionability, fraud, duress, etc.). (*Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 682 ("*Doctor's Associates*"); *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 414.) This must be done with competent evidence. It is not defendant who must supply *evidence of competence*, but plaintiffs who must supply *evidence of incompetence*, and sufficient for proof by a preponderance of the evidence.

The law makes a rebuttable presumption that "all persons have the capacity to make decisions and to be responsible for their acts or decisions." (Prob. Code § 810.) Plaintiffs have not proven by a preponderance of the evidence that Ms. Anderson was incompetent to sign the ADR Agreement. They have not overcome the law's presumption. At best, even by their own argument, they attempt a summary judgment standard of showing a "triable issue of material fact" (i.e., that they have "raised a question" of her competence). More is required to defeat the petition.

Defendant supplied evidence which tends to show Ms. Anderson was alert and competent enough to meet with Ms. Xiong and have the admissions documents (including the ADR Agreement) explained, and to sign those documents. Plaintiffs' evidence only shows she *might* have been impacted by the medications she was taking and the pain she was experiencing. While Ms. Xiong's testimony does not serve to establish Ms. Anderson's medical or mental condition, it is certainly sufficient to show that Ms. Xiong observed Ms. Anderson specifically to determine if she saw any impairment implicating an inability to sign the documents, and that she did not see anything that raised this concern.

There was no testimony from Ms. Anderson herself stating that she was unable to concentrate or understand what she was signing, or that she was confused about any term of the documents she was signing, nor any evidence otherwise contradicting Ms. Xiong's argument as to how that meeting progressed. There is no evidence of incompetency that would serve as a basis to deny this petition.

Compliance with Code of Civil Procedure Section 1295:

Code of Civil Procedure section 1295 requires the advisement of a patient's waiver of his/her right to a jury trial in a medical malpractice arbitration agreement to include specified language, and subdivision (b) of that statute requires the "notice" language immediately before the signature line to be in 10-point boldface *red* type. Failure to include this language automatically renders the arbitration agreement unenforceable. (*Rosenfield v. Superior Court* (1983) 143 Cal.App.3d 198, 202-203 ("*Rosenfield*").)

First and foremost, no proof was submitted that the advisement at issue was *not* in red font on the original contract signed by plaintiff; all that can be said is that the copy defendant submitted into evidence did not show the language in a red font, which could simply have been due to using a non-color copier. Contrary to plaintiffs' argument, it was their burden to establish this as a fact in order to support their argument, and not defendant's burden. The party opposing arbitration has the burden

of proving any generally applicable contract defenses. (*Doctor's Associates, supra*, 517 U.S. at p. 682.)

Furthermore, *Rosenfield* is distinguishable from the case at bench. There, the contract contained none of the advisements required by Code of Civil Procedure section 1295, whereas here the contract contains all of the required advisements, and if it indeed fails use a red font for the language above the signature, this is a minor failure. Also, unlike the defendant in *Rosenfield,* here defendant did offer evidence as to the circumstances surrounding the execution of the agreement via the declaration of Ms. Xiong.

More important, in *Rosenfield* the issue of federal preemption was not discussed as a factor, which likely means arbitration under the FAA was not at issue. Here, preemption is a factor. The United States Supreme Court has unequivocally spoken: the FAA preempts a "conflicting state antiarbitration law." (*Allied-Bruce Terminix Companies, Inc. v. Dobson* (1995) 513 U.S. 265, 271-272.) Thus, a state law applicable *only* to arbitration provisions, such as section 1295, may not defeat an arbitration clause in contracts subject to the FAA. (*Doctor's Associates, supra*, 517 U.S. at p. 687.)

Procedural Unconscionability:

If the court finds as a matter of law that a contract or any portion of it was unconscionable at the time it was made, the court may refuse to enforce it, or may enforce the contract without the unconscionable provisions, or limit their application to avoid any unconscionable result. (Civ. Code § 1670.5, subd. (a).) Procedural unconscionability has to do with the manner in which the contract was negotiated and the parties' circumstances at that time, and focuses on the factors of oppression or surprise. (*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1327; *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 113.) Substantive unconscionability exists if the terms of the agreement are overly harsh or one-sided, provisions which shock the conscience, are unduly oppressive, or unreasonably favorable to the party seeking to compel arbitration. (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 909.)

Both procedural and substantive unconscionability must be present for a court to exercise its discretion to refuse to enforce an arbitration agreement under the doctrine of unconscionability. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113; *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1158—unnecessary to decide whether contract was one of adhesion and procedurally unconscionable because it was not substantively unconscionable; *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1124, *as modified on denial of reh'g (Aug. 14, 2012)* (Accord).) However, plaintiffs made no argument at all as to substantive unconscionability. Thus, even if procedural unconscionability was found to exist, it would not be a ground to deny this petition.

Moreover, plaintiffs' argument that procedural unconscionability exists is contradicted by the evidence supplied by Ms. Xiong's declaration, discussed *supra*. The

cases of *Young Seok Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1515 and *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1407 are distinguishable, since in both these cases the courts focused on the fact that the arbitration rules at issue were substantively unconscionable, and thus the failure to supply those rules at the time of signing also contributed to finding procedural unconscionability. Plaintiffs have failed to show how the JAMS rules are substantively unconscionable. Furthermore, a footnote in the contract provides the internet address for obtaining the JAMS rules.

Waiver:

The party seeking to show a waiver must demonstrate: 1) the other party's knowledge of an existing right to compel arbitration; 2) acts inconsistent with that right; and 3) prejudice to the party opposing arbitration. (*Aviation Data, Inc. v. American Express Travel Related Services Co., Inc.* (2007) 152 Cal.App.4th 1522, 1537.)

The law favors arbitration, and thus, waiver will not be "lightly inferred." (*Saint Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 ("*Saint Agnes*").) Thus, the party seeking to prove waiver "bears a heavy burden of proof." (*Id.; Gloster v. Sonic Automotive, Inc.* (2014) 226 Cal.App.4th 438, 447 (accord).) While the party demanding arbitration must demand it within a "reasonable time," determining what is "reasonable" is a question of fact that depends on the situation of the parties, the nature of the transaction, and the facts of the particular case. (*Spear v. California State Auto. Assn.* (1992) 2 Cal.4th 1035, 1043.)

Participating in the litigation of an arbitrable claim does not itself waive a party's right to later compel arbitration. (*Saint Agnes*, *supra* at p. 1203.) While there is no single test as to what participation in litigation justifies finding waiver, relevant factors include: 1) whether the party's actions are inconsistent with the right to arbitrate; 2) whether the "litigation machinery has been substantially invoked" such that the parties were "well into preparation of a lawsuit" before arbitration was demanded; 3) whether the demand is made close to the trial date or the demanding party delayed for a long period before seeking a stay; 4) whether the demanding party filed a counterclaim without asking for a stay; 5) whether "important intervening steps" had taken place, such as taking advantage of judicial discovery procedures not available in arbitration; and 6) whether the delay "affected, misled, or prejudiced" the opposing party. (*Saint Agnes* at p. 1196, citing and quoting from *Sobremonte v. Superior Court (Bank of America Nat. Trust and Sav. Ass'n)* (1998) 61 Cal.App.4th 980, 992, *as modified (Feb. 26, 1998)*.)

Plaintiffs have failed to meet their heavy burden of proving waiver. Filed documents judicially noticed demonstrate that defendant reserved its right to arbitration in its original answer, and the declaration of counsel, Demand for Jury Trial, and Notice of Deposit of Jury Fees filed with that answer, as well as in its answer to the Second Amended Complaint. It has not filed a counterclaim, or filed any motions challenging the pleadings. It demanded arbitration while the case is still at the pleading stage, and no trial date has been set.

The only potential for finding conduct justifying waiver is defendant's propounding of written discovery on plaintiffs. However, on balance, this does not rise to the level necessary to find waiver. It is common knowledge that the JAMS Arbitration rules allow for discovery, including depositions and document production. Furthermore, plaintiffs themselves argue that Code of Civil Procedure section 1283.05 (discussed *ante*) is by statute made a part of this ADR Agreement, and that statute provides for the right to discovery and discovery motions "as if the subject matter of the arbitration were pending before a superior court of this state…." Thus, defendant's act of propounding written discovery was not an action inconsistent with an intent to arbitrate. Defendant did not obtain anything from this discovery that it could not have obtained in arbitration, so it did not prejudice plaintiffs.

Plaintiffs' also argue that waiver has occurred because of defendant's purported breach of the ADR Agreement. They argue breach has occurred because it obtained discovery prior to an arbitrator being appointed. They base this on reasoning that Code of Civil Procedure section 1283.1 provides that section 1283.05 is "conclusively deemed" to be incorporated into any arbitration agreement regarding a dispute involving injury or death caused by negligence or wrongful act, and section 1283.05, subdivision (a) provides, "*After* the appointment of the arbitrator…the parties shall have the right to take depositions and to obtain discovery…." (Emphasis added.) They argue this means no discovery can be taken until after an arbitrator is appointed, so defendant has breached the arbitration agreement by not complying with this statute, and thus it cannot compel arbitration.

However, plaintiffs have failed to establish that the language of the statute is properly read in the way they have interpreted it. They cited no authority supporting this interpretation. Section 1283.05 merely indicates that the right to discovery exists after an arbitrator is appointed; it does not say no discovery may be conducted in a civil action that exists *before arbitration is commenced.* Reading the statute in the way put forward by plaintiffs would mean that there was a *per se* rule that conducting discovery prior to demanding arbitration was an automatic waiver of the right to demand arbitration. However, the California Supreme Court has clearly held there is no *per se* rule about waiver. "Waiver does not occur by mere participation in litigation; there must be "judicial *litigation* of the merits of arbitrable issues." (*Keating v. Superior Court* (1982) 31 Cal.3d 584, 605, *rev'd in part on other grounds, appeal dismissed in part sub nom. Southland Corp. v. Keating* (1984) 465 U.S. 1, emphasis in the original, internal quotes omitted.) This argues against plaintiff's interpretation of the statute. Defendant's discovery efforts cannot be deemed a breach of the ADR Agreement, and thus a waiver.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 05/09/16 .

(Judge's initials) (Date)

(28) Tentative Ruling

Re: **Moultrie v. Bed, Bath & Beyond, Inc.**

Case No. 15CECG03102

Hearing Date: March 10, 2016 (Dept. 403)

Motion: By Plaintiff for Leave to File First Amended Complaint.

IF ORAL ARGUMENT IS REQUESTED, IT WILL BE HELD ON THURSDAY, MAY 12, 2016 AT 3:00P.M. IN DEPARTMENT 403.

Tentative Ruling:

To grant, except to the extent that Plaintiff seeks to change the designation of parties in the caption. Therefore, Plaintiff shall provide a corrected First Amended Complaint which reverts to the original caption, and file and serve it within five court days. Defendants shall then have 30 calendar days after service of the First Amended Complaint (adjusted per Code of Civil Procedure §1005) in which to file and serve a response.

Explanation:

Judicial policy favors resolution of all disputed issues between parties in the same lawsuit, therefore the court's discretion will usually be exercised liberally to permit amendment of the pleadings. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939.)

A motion to amend a pleading before trial must:

(1) Include a copy of the proposed amendment or amended pleading, which must be serially numbered to differentiate it from previous pleadings or amendments;
(2) State what allegations in the previous pleading are proposed to be deleted, if any, and where, by page, paragraph, and line number, the deleted allegations are located; and
(3) State what allegations are proposed to be added to the previous pleading, if any, and where, by page, paragraph, and line number, the additional allegations are located.

(Cal. Rule of Ct. 3.1324, subdivision (a).)

Here, the Court assumes that Plaintiff did not delete any material portions of the Complaint (other than the name on the Caption), and issues this tentative in reliance on that assumption.

It is the case that Plaintiff did not comply with subdivision (3) of Rule 3.1324, subdivision (a). However, because Plaintiff included a copy which set the proposed additions in boldface typeset, it is readily apparent what the relevant allegations are. Therefore, the Court will not deny the motion on this ground.

A plaintiff must also attach a declaration specifying "(1) the effect of the amendment; (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) the reasons why the request for amendment was not made earlier." (Cal. Rule of Ct. 3.1324, subdivision(b).).

Defendant objects to various portions of the declaration by Plaintiff's counsel on the grounds that insofar as they state the underlying facts, they are hearsay, lack foundation, or are beyond the declarant's personal knowledge. However, the point of the proffered declaration is not to prove the facts in the proposed amendment, but to explain the means by which Plaintiff became aware of them and why and how the amendment is "necessary and proper." Therefore, the Court overrules the objections.

The declaration contains the information required by Rule 3.1324, subdivision (b). To the extent that Defendant argues that the proposed amendments are defective in some way, Defendant can challenge those allegations in its response, whether by demurrer or motion to strike.

However, Plaintiff has amended the Caption of the Complaint without notice (the change was not bolded and there is no mention of the change in the moving papers). (*Cf. Bank of America v. Superior Court* (1973) 35 Cal.App.3d 555, 557 (affirming granting of motion to amend to change name on caption).) Thus, although it makes no substantive difference, because Defendant has objected, the motion is denied to the extent that it seeks to change the name of a defendant in the caption. (*See also Plumlee v. Poag* (1984) 150 Cal.App.3d 541, 547) (correctly designated party in the body of the complaint cures any defect in the caption).

For all the foregoing reasons, the motion for leave to amend is granted, except to the extent that Plaintiff seeks to change the designation of parties in the caption. Therefore, Plaintiff shall provide a corrected First Amended Complaint and file and serve it within five court days. Defendants shall have 30 calendar days after service of the First Amended Complaint (adjusted per Code of Civil Procedure §1005) in which to file and serve a response.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 05/09/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 501

(28) **Tentative Ruling**

Re: **State of California v. Acrew Management, LLC et al.**

Case No. 14CECG01444

Hearing Date: May 10, 2016 (Dept. 501)

Motion: By Plaintiff State of California for Ruling on Issue Effecting the Determination of Compensation RE: Whether an Effective Agreement Exists Regarding Transfer of Possession

Tentative Ruling:

To grant the motion insofar as it seeks a ruling that the "Possession and Use Agreement was never effective." To deny the motion insofar as the Notice seeks a ruling that possession "never transferred to the State."

To deny the motion to the extent that it seeks a ruling that "the improvement on the Subject Property cannot be considered in determining compensation." This denial is without prejudice to raising these issues at trial or any relevant proceeding.

Explanation:

[The Court notes that no Reply Brief appears in the Court's files.]

Plaintiff has filed a Motion for "Ruling on Issue Affecting the Determination of Compensation" pursuant to Code of Civil Procedure §1260.040. The Amended Notice asks the Court to make two rulings: first, "that the Possession and Use Agreement was never effective so possession never transferred to the State"; and, second, "that the improvement on the Subject Property cannot be considered in determining compensation."

As an initial matter, it appears that Plaintiff has conceded that it took possession of the property as of June 2, 2014, when the parties executed the Right of Entry. (Amended Points and Authorities, p. 5.) Therefore, the Court will not issue a ruling that "possession never transferred to the State."

Code of Civil Procedure §1260.040 states (in pertinent part):

> (a) If there is a dispute between plaintiff and defendant over an evidentiary or other legal issue affecting the determination of

compensation, either party may move the court for a ruling on the issue. The motion shall be made not later than 60 days before commencement of trial on the issue of compensation. The motion shall be heard by the judge assigned for trial of the case.

(b) Notwithstanding any other statute or rule of court governing the date of final offers and demands of the parties and the date of trial of an e eminent domain proceeding, the court may postpone those dates for a period sufficient to enable the parties to engage in further proceedings before trial in response to its ruling on the motion.

This section "permits either party to move for a ruling on a legal issue affecting the determination of compensation and requires that the motion be brought before the judge assigned for trial of the case." (*Dina v. People ex rel. Dept. of Transp.* (2007) 151 Cal.App.4th 1029, 1045.) In ruling on a motion to determine that a taking had occurred (via inverse condemnation), the *Dina* court likened the procedure to one for non-suit, such that the court must accept all facts presented by the responding party as true and indulge every inference in favor of the responding party and granting the motion only if the responding party cannot establish an essential element of its case. (*Id.* at 1047.)

- Here, Defendant has presented evidence as to the following: counsel for Defendant signed a Memorandum on May 13, 2014. This document states that the owner of the Subject Property grants to the CHSRA the right of possession and that the right is "irrevocable." However, this document is not signed by any representative of the State of California and also contains a provision that it is subject to the Agreement. The Agreement itself contains a provision that it is not complete until "execution by the State."

Defendant has also presented the declaration of its counsel stating that it was intending to procure fire insurance on the property, but declined because he was specifically told by a representative of the State that execution of the Agreement was a "ministerial act." Defendant contends that this constitutes equitable estoppel sufficient to provide transfer of possession at the earlier date. (*Cf. Times-Mirror Co. v. Superior Court* (1935) 3 Cal.2d 309, 329-31 (city equitably estopped from abandoning taking when defendant had purchased new building in reliance on city, county, and state representations).)

Civil Procedure §1263.230 states (in pertinent part):

(a) Improvements pertaining to the realty shall not be taken into account in determining compensation to the extent that they are removed or destroyed before the earliest of the following times:

(1) The time the plaintiff takes title to the property.

(2) The time the plaintiff takes possession of the property.

Although Defendant appears to be correct that the Memorandum of Agreement promised an irrevocably granting of possession, the Memorandum was subject to the terms of the Agreement itself, which rendered the terms not complete until the State had signed the agreement. Even as a "ministerial act," it would not be reasonable to consider the approval instantaneous such that possession would be taken immediately. To the extent that equitable estoppel is a valid issue, such a factor might more properly go to the amount of compensation owed by Plaintiff, not as to when Plaintiff gained possession, but the Court expresses no opinion on this issue.

Therefore, the Court finds that the CHSRA did not take possession of the Subject Property until June 2, 2014.

However, the State also asks the Court to fund that the "partially destroyed improvement" should not be considered as compensation pursuant to section 1263.230. The Court declines to do so.

First, section 1263.230 states that improvements shall not be taken into consideration with respect to compensation provided that they are "removed or destroyed" prior to the date of possession or transfer of title. Here, the evidence presented by the State contains only a citation to Fresno Fire Department report that a building on the property was "burned to the ground." There is a reference to it being a "front building" and that the fire crews "halted the spread of the fire into the warehouse portion of the building." Plaintiff cites to no other evidence to indicate the extent to which the improvement is "destroyed." In fact, the motion itself indicates that the improvement is "partially destroyed." (Amended Memorandum of Points and Authorities at p. 4.) Section 1263.230 states that the improvement must be "destroyed" without qualification. Therefore, it is unclear the extent to which Section 1263.230 applies.

Second, to grant the motion as Plaintiff asks would require the Court to make a determination as to the extent of the destruction of the improvement and thereby determine the compensation owed to Defendant. This appears to be more properly the province of the jury. (*Dina*, *supra,* 151 Cal.App.4th at 1044-45 (California Constitution requires just compensation to be determined by a jury (citing Cal.Const. Art1, §19)).)

Therefore, the Court denies the Motion to the extent that Plaintiff seeks a ruling that the "partially destroyed improvement not be considered as part of the valuation of compensation." This ruling is without prejudice to consideration of these issues upon a more complete evidentiary basis.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 5/9/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 502

(20) **Tentative Ruling**

Re: ***Gonzalez et al. v. Vemma Nutrition Company et al.***
Case No. 14CECG00134
Alonzo et al. v. Vemma Nutrition Company et al.
Case No. 14CECG01023
Martinez v. Vemma Nutrition Co. et al.
Case No. 14CECG01715
Smith v. Union Pacific Railroad et al.
Case No. 14CECG02314

Hearing Date: **May 10, 2016 (Dept. 502)**

Motion: (1) Raymond Fernandez' Motion to be Designated as Plaintiff; (2) Defendant Zim Industries' Motion to Continue Trial

Tentative Ruling:

To grant the motion to designate Raymond Fernandez as plaintiff. Fernandez may file his complaint within 10 days of service of the order by the clerk.

To grant the motion to continue trial. The court orders the trial be continued to September 12, 2016 at 9:00 in Dept. 501, with trial readiness on September 9, 2016 at 9:30 in Dept. 501 and a mandatory settlement conference on August 24, 2016 at 10:00 a.m. in Room 575.

Explanation:

Raymond Fernandez, initially sued as a nominal defendant pursuant to Code of Civil Procedure section 382, seeks to be realigned as a plaintiff and to file a complaint. The motion is unopposed and should be granted, as his true interest is that of a plaintiff.

Zim Industries moves to continue the July 11, 2016, trial date, primarily because lead counsel has a pre-planned vacation during the expert witness discovery period, Fernandez seeks to be realigned as a plaintiff and is not ready to go to trial and/or further discovery is needed as to his claims. Having considered the factors set forth in California Rules of Court, Rule 3.1332(c), the court finds that there is good cause for a continuance and orders the trial continued to September 12, 2016 at 9:00 in Dept. 501, with trial readiness on September 9, 2016 at 9:30 in Dept. 501 and a mandatory settlement conference on August 24, 2016 at 10:00 a.m. in Room 575. Given the trial continuance and the volume of summary judgment motions all set for June 8, 2016, by separate minute order the court will be continuing the hearings on these motions for new dates.

Tentative Ruling
Issued By: DSB on 5/6/16 .
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Hawkins v. Sierra Meadows Senior Living***
Court Case No. 14CECG03808

Hearing Date: **May 10, 2016 (Dept. 502)**

Motion: Petition to Approve Compromise of Pending Action concerning a Disabled Adult

Tentative Ruling:

To grant, awarding petitioner's counsel $87,454.00 in attorney fees and $6,365.66 in costs. The fee has been calculated net of costs. The net award, in the amount of $97,000.71 shall be made payable to the Trustee of The Hawkins Family Trust, with the funds to be used only for the care of Mr. Hawkins, and said Trustee is required to file periodic accountings with the Probate court pursuant to Probate Code section 17200, on at least a biennial basis. Petitioner is directed to submit for signature a Judicial Council form of order which includes these terms.

Explanation:

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary, except as provided above. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 5/9/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 503

(30)

Re: ***Platinum Capital Properties, LLC v. Mao Cha***
Superior Court No. 15CECG03469

Hearing Date: Tuesday, May 10, 2016 (**Dept. 503**)

Motion: (1) Cross-Defendant's Demurrer to Cross-Complaint

Tentative Ruling:

To **Sustain** the demurrer to Cross-Complaint, regarding both causes of action, due to lapses of the statutes of limitations.

Demurrers are granted without prejudice, with 20 days leave to amend, meet and confer required in accordance with Code of Civil Procedure section 430.41, before amended Cross-Complaint filed.

Explanation:

California Civil Code of Procedure section 430.10(e)
A general demurrer for failure to state a cause of action asks the court to consider whether all essential elements of each cause of action have been alleged. (CCP § 430.10 (e); *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872; *Donabedian v. Mercury Ins. Co* (2004) 116 Cal.App.4th 968, 994.) "To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." (*C.A. v. William S. Hart Union High School Dist, supra,* 53 Cal.4th at 872 (general demurrer improperly sustained)—plaintiff was not required to specify at pleading stage which of defendant's employees committed negligent acts or omissions on which liability was based.)

Breach of Contract
Elements of breach of contract are: (1) the existence of a contract; (2) plaintiff's performance or excuse for non-performance; (3) defendant's breach; and (4) damages to plaintiff from the breach. (*Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913.)

Here, Cross-Defendant argues that Cross-Complainant fails to allege the necessary elements because, Cross-Complainant, "merely asserts the existence of a contract but nothing more. Defendant further makes a claim of PG&E meters but does not state what 'contract he had with Plaintiff, or how he incurred any damages therefrom. Defendant also fails support that he performed under the agreement, or that he was excused from performance" (Demurrer, filed 4/21/16 p8 lns 10-14). However, in his Cross-Complaint, Cross-Complainant pleads the required elements: As part of the lease

agreement, Cross-Defendant agreed to provide an internet connection and split the PG&E (Cross-Complaint ¶ BC-1). Cross-Defendant did not provide the services as promised, thereby breaching the contract and causing $ 2,100,000 in damages (Cross-Complaint ¶ BC-2, BC-4). Cross-Defendant's assertion that PG&E is the "responsibility of the Tenant" per the lease agreement (Demurrer, filed 4/21/16 p8 ln 19) will not be considered, since a Defendant cannot strengthen the demurrer by bringing in evidentiary material that discloses a defect in the complaint (*Colm v. Francis* (1916) 30 Cal.App. 742.) Further, Cross-Complainants adequately asserts performance (entering into the lease) (Cross-Complaint, ¶ BC-1). Demurrer is overruled on the basis of failure to state a cause of action for breach of contract (Code Civ. Pro., 430.10(e)).

Fraud
To establish a cause of action for fraud, a party must allege the following: (1) knowingly make a false representation; (2) with an intent to deceive or induce reliance; (3) justifiable reliance by the party; and (4) damages resulting therefrom. (*Service by Medallion, Inc. v. Clorox Ca* (1996) 44 Cal.App.4th 1807, 1816; *Lovejoy v. AT& T Corp.* (2004) 119 Cal.App.4th 151, 161.)

Here, Cross-Defendant argues that Cross-Complainant fails to allege the necessary elements because, Cross-Complainant, "only pleads a knowingly false representation by Plaintiff but fails to state facts supporting 1) intent to deceive; 2) justifiable reliance by party or 3) damages resulting therefrom" (Demurrer, filed 4/21/16 p9 lns 17-21). However, in his Cross-Complaint, Cross Complainant pleads the <u>required</u> elements: Cross-Defendant made the (alleged) misrepresentations with the intent to induce Cross-Complainant to enter into the lease (Cross-Complaint, ¶ FR-2, FR-3). Cross-Complainant entered into the lease in reliance upon Cross-Defendant's representations (Cross-Complaint, ¶ BC-1). Cross-Complainant suffered $ 2,100,000 in damages as a result of Cross-Defendant's misrepresentations (Cross-Complaint, ¶ BC-4). Demurrer is overruled on the basis of failure to state a cause of action for fraud (Code Civ. Pro., 430.10(e)).

<u>Code of Civil Procedure section 430.10 (f)</u>
A demurrer for uncertainty will be sustained only where the complaint is so bad that defendant *cannot reasonably* respond—i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.) Thus, demurrers for uncertainty will almost certainly be overruled where the facts alleged in the complaint are *ascertainable* by invoking discovery procedures. (*Khoury v. Maly's of Calif., Inc.,* supra, 14 Cal.App.4th at 710.)

Here, Cross-Defendant asserts Code of Civil Procedure section 430.10 (f) as grounds for demurrer in the introduction to their memorandum of points and authorities (Demurrer, filed: 4/21/16 p3), but does not elaborate.

California Rules of Court, rule 3.1113, subdivisions (a) and (b) requires the moving party to serve and file a memorandum that contains "a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced."

Since Cross-Defendant offers no support for this argument, it should not be considered. Nonetheless, it is meritless. Cross-Defendant knows who the parties are and what causes of action are being asserted against it. Demurrer is overruled on the basis of uncertainty as it applies to both causes of action (Code Civ. Pro., 430.10(f)).

California Civil Code of Procedure section 430.10(g)

The party against whom a complaint or cross-complaint has been filed may object, by demurrer, in an action founded upon a contract, where it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct. (Code Civ. Proc., 430.10 (g); *Maxwell v. Dolezal* (2014) 231 Cal.App.4th 93.)

Here, Cross-Defendant makes it clear that the contract was written (Cross-Complaint, ¶ BC-1(a)). Demurrer is overruled on the basis of failure to allege whether contract was written, oral or implied (Code Civ. Pro., 430.10(g)).

Statutes of Limitations

Where the dates alleged in the complaint show the action is barred by the statute of limitations, a general demurrer lies. (*Saliter v. Pierce Bros. Mortuaries* (1978) 81 Cal.App.3d 292, 300; *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 995; *Vaca v. Wachovia Mortg. Corp.* (2011) 198 Cal.App.4th 737, 746.) The running of the statute must appear "clearly and affirmatively" from the face of the complaint. It is not enough that the complaint *might* be time-barred. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324-325; *Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 321.)

Breach of Contract

The statute of limitations on an action for breach of contract is four years for a written contract and two years for an oral contract. (Code Civ. Proc., §§ 337(1), 339(1).)

Here, Cross-Complainant alleges that Cross-Defendant breached its agreement with him on November 21, 2011 (Cross-Complaint, ¶ BC-2). Therefore, any cause of action for breach of contract, whether written or oral, is barred by the statute of limitations. Demurrer is sustained on the basis of lapse of statute of limitations, as it applies to breach of contract.

Fraud

The statute of limitations for intentional deceit is three years. (Code Civ. Proc., § 338(d).) The claim accrues upon discovery of the facts constituting the deceit. (Code Civ. Proc., § 338(d); *Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415, 1423-1424.)

Here, Cross-Complainant alleges that Cross-Defendant defrauded him on November 21, 2011 (Cross-Complaint, ¶ FR-1, FR-2). Further, Cross-Complainant makes no claim of delayed discovery and implies that he was made aware of the misrepresentation at the time of the lease or shortly thereafter (alleges fraud occurred in November 2011 and he entered lease in November 2011). Therefore, any cause of action for fraud is

barred by the statute of limitations. Demurrer is sustained on the basis of lapse of statute of limitations, as it applies to fraud.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 5/5/16 .
(Judge's initials) (Date)